

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. \_\_\_\_\_

5280 PUBLISHING, INC., doing business as *5280 Magazine*, and,  
MAXIMILLIAN POTTER,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE, an agency of the United States Government,  
and  
NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE,  
a congressionally established office within U.S. Department of Defense,

Defendants.

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**VERIFIED COMPLAINT**

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Plaintiffs 5280 Publishing, Inc. and Maximillian Potter, through their attorneys with  
Faegre & Benson, LLP, for their Verified Complaint under the Freedom of Information Act  
("FOIA"), against Defendants United States Department of Defense ("DoD") and National  
Committee for Employer Support of the Guard and Reserve ("NESGR"), state as follows:

**INTRODUCTION**

1. This is an action by 5280 Publishing, Inc. and the executive editor of its *5280 Magazine* to obtain agency records relating to mediation cases handled by NCESGR's Colorado office, the Colorado Committee for Employer Support of the Guard and Reserve, which agency records may demonstrate that NCESGR has violated the trust placed in that agency by members of the United States Military by having appointed mediators who have undisclosed conflicts of

interest that prevent them from fairly and honestly mediating disputes between members of the National Guard and Reserve and those members' civilian employers. In addition, Plaintiffs seek immediate, emergency injunctive relief to preserve the agency records that are the subject to Mr. Potter's FOIA request in light of an apparent – and recently discovered – post-request instruction by NCESGR to all state ESGR offices, including the Colorado office, to destroy records of closed mediation cases. This document destruction directive is likely to cause irreparable and permanent damage to Plaintiffs' rights under the FOIA.

### **JURISDICTION AND VENUE**

2. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The Court has authority to enter any and all orders to preserve its jurisdiction in this matter under the All Writs Act, 28 U.S.C. § 1651.

3. The Court has personal jurisdiction over the defendants pursuant to 5 U.S.C. § 552(a)(4)(B).

4. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) because Plaintiffs reside in this District.

### **PARTIES**

5. Plaintiff 5280 Publishing, Inc., is a corporation organized under the laws of the State of Colorado, in good standing with the Secretary of State of Colorado, with its principal place of business at 1514 Curtis Street, Suite 300, Denver, Colorado, 82022. 5280 Publishing, Inc. publishes the magazine *5280 Magazine*, which reports on issues and events of concern to readers in the Denver metropolitan area and beyond. 5280 Publishing, Inc. constitutes a representative of the “news media,” as that term is used in the FOIA.

6. Plaintiff Maximilian Potter is a resident of the State of Colorado. Mr. Potter is employed by 5280 Publishing, Inc. as the executive editor of *5280 Magazine*. Mr. Potter constitutes a representative of the “news media,” as that term is used in the FOIA.

7. Defendant United States Department of Defense (“DoD”) is an agency of the United States Government and is subject to suit under the FOIA. *See* 5 U.S.C. § 552(f)(1).

8. Defendant National Committee for Employer Support of the Guard and Reserve (“NESGR”) is a congressionally created office within the U.S. Department of Defense, functioning under the auspices of the Office of the Secretary of Defense and the Under Secretary of Defense for Personnel and Readiness. NCESGR is the office within the Department of Defense that has possession or control over the agency records at issue in this action. A true and correct copy of DoD Directive 1250.1, dated April 13, 2004, reauthorizing the NCESGR is attached hereto as **Exhibit A**.

### **GENERAL ALLEGATIONS**

#### **A. Statutory Framework**

9. The FOIA requires federal agencies to provide public access to requested records unless one of the statute’s exemptions applies. *See* 5 U.S.C. §§ 552(a)(3) and 552(b).

10. Upon receiving a FOIA request, an agency has twenty working days to determine and announce what records the agency will release, what records the agency plans to withhold, the reasons justifying any such withholding, and the appeal rights available to the requester. *See* 5 U.S.C. § 552(a)(6)(A).

11. Under the FOIA, the DoD is required to undertake a search that is reasonably calculated to uncover all relevant documents. *See Campbell v. U.S. Dep’t of Justice*, 164 F.3d

20, 27 (D.C. Cir. 1998) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

12. Although an agency may grant itself an extension of ten additional days in “unusual circumstances,” the FOIA does not permit an agency to delay a response indefinitely. *See* 5 U.S.C. § 552(a)(6)(B)(i). Under the FOIA, an agency must notify the requester in writing of any limited extension of the twenty-day deadline and must state the justification for the extension. *See id.*

13. The FOIA provides that a requester “shall be deemed to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit provisions.” *See* 5 U.S.C. § 552(a)(6)(A).

14. The FOIA permits agencies to withhold records or portions of records under certain circumstances. *See* 5 U.S.C. § 552(b). When an agency denies a request for records, it must adequately explain the reasons for each denial, and reference the specific exemption or exemptions authorizing the withholding. *See* 32 C.F.R. § 286.23(3)(3). Agencies must provide to the requester “[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt . . . .” *See* 5 U.S.C. § 552(b).

15. The FOIA places the burden on the agency to sustain the lawfulness of specific withholdings. *See* 5 U.S.C. § 552(a)(4)(B). Under the FOIA, agencies must provide requesters with an itemized index (known as a “*Vaughn* index”) that describes any withheld document or withheld portion with sufficient particularity to identify the document or portion, and gives a detailed justification of the agency’s ground for the withholding.

16. The FOIA provides this Court with jurisdiction to enjoin an agency “from withholding agency records and to order the production of any such records improperly withheld.” 5 U.S.C. § 552(a)(4)(B).

**B. Plaintiffs’ FOIA Request**

17. Among its various programs, NCESGR operates a mediation service for members of the National Guard and Reserve to address disputes between service members and their civilian employers, most often arising under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§ 4301, *et seq.* This mediation service was established in 1974 under the name Ombudsmen Services Program. Mediators are referred to as “ombudsmen,” and they serve as unpaid volunteers at the direction of NCESGR’s state offices. A true and correct copy of excerpts NCESGR’s website, describing its programs, including the Ombudsmen Services Program, is attached hereto as **Exhibit B**.

18. Plaintiffs are investigating whether the Colorado office of NCESGR has appointed mediators to USERRA mediation matters who have undisclosed biases or conflicts of interest that undermine the objectivity and efficacy of the mediation process under the Ombudsmen Services Program.

19. In pursuit of that investigation, Mr. Potter made a FOIA request on behalf of himself and *5280 Magazine* for access to and copies of “notes, memorandums, minutes on USERRA-based employer-employee disputes (‘cases’ or ‘files’) mediated in the state of Colorado since 2004 to the present by representatives or ‘Ombudsmen’ of [NCESGR].” This request was sent by e-mail correctly addressed to the Office of Freedom of Information for the DoD on June 2, 2006. A true and correct copy of this request is attached hereto as **Exhibit C**.

20. On June 13, 2006, the Office of Freedom of Information of DoD denied Mr. Potter's request for expedited processing of his FOIA request, but the DoD did not provide any substantive response to Mr. Potter's underlying FOIA request. A true and correct copy of this letter is attached hereto as **Exhibit D**.

21. On June 26, 2006, Mr. Potter filed an administrative appeal of the denial of his request for expedited processing of his FOIA request. A true and correct copy of this appeal letter is attached hereto as **Exhibit E**.

22. On July 7, 2006, Mr. Potter learned that on or about June 14, 2006, NCESGR issued a directive to its state offices asking each state office to instruct all volunteer ombudsmen to "immediately delete or destroy any old files you have retained but have already reported as closed to NCESGR." A redacted copy of an e-mail sent to Fred Samuelson, an ESGR ombudsman in Maryland, reflecting this directive from NCESGR, with redactions based on a reporter-source confidentiality agreement with Mr. Samuelson, is attached hereto as **Exhibit F**.

23. Mr. Potter subsequently confirmed that NCESGR's directive that all volunteer ombudsmen should destroy their old mediation files was sent to all of NCESGR's state offices.

24. On July 9, 2006, counsel for Mr. Potter sent a letter to DoD and NCESGR notifying them of Plaintiffs' concerns that Mr. Potter's FOIA request had been undermined by NCESGR's directive to ombudsmen that they destroy their old files. Through counsel, Plaintiffs requested assurance from DoD and NCESGR that documents responsive to Mr. Potter's FOIA request had not been destroyed and that the DoD had taken adequate steps to preserve the documents that were within the scope of Mr. Potter's request. A true and correct copy of counsel's July 9, 2006, letter is attached hereto as **Exhibit G**.

25. To date, neither DoD nor NCESGR have provided any response to the request for assurance that no responsive documents have been destroyed.

26. In addition, neither DoD nor NCESGR have provided any substantive response to Mr. Potter's underlying FOIA request.

**COUNT I**  
**Violation of the FOIA**  
**(5 U.S.C. § 552(a)(3))**

27. Plaintiffs hereby reallege, as if fully set forth herein, the allegations of the preceding paragraphs.

28. DoD and NCESGR have failed to make available the records requested in Mr. Potter's June 2, 2006 FOIA request.

29. DoD and NCESGR have failed to provide a written response to Mr. Potter's underlying FOIA request within twenty working days, and they have failed to give written notice of an extension of the twenty-day deadline, as is required under 5 U.S.C. § 552(a)(6)(B)(i).

30. This failure to respond within the specified time limits established by the FOIA constitutes constructive denial of Mr. Potter's FOIA request and constructive exhaustion of any administrative remedies pertaining to the FOIA request under 5 U.S.C. § 552(a)(6)(C)(i).

31. In light of these failures, DoD and NCESGR have improperly withheld records or portions of records in violation of 5 U.S.C. § 552(a)(3).

32. DoD and NCESGR also have failed to

- conduct a reasonable search for documents responsive to the request,
- adequately explain the reasons for this denial,

- properly reference the specific exemption or exemptions authorizing the withholding in a written notice to Plaintiffs, and
- provide Plaintiffs with an itemized *Vaughn* index of any withheld documents or portions of documents, and
- provide timely notice to Plaintiffs of their rights to bring an administrative appeal.

33. Defendants' failure to comply with their above-described duties violates the FOIA and applicable DoD regulations. This failure is arbitrary, capricious, and otherwise not in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

34. Plaintiffs have been harmed by Defendants' violation of the FOIA and applicable DoD regulations.

35. Plaintiffs are entitled to declaratory and injunctive relief, and an award of their reasonable attorney's fees, in light of Defendants' violation of the FOIA and applicable DoD regulations.

**WHEREFORE**, Plaintiffs pray for judgment as follows:

A. Immediate temporary and preliminary injunctive relief ordering DoD and NCESGR to rescind the apparent document destruction directive described in Exhibit F, at least to the extent the directive would otherwise apply to documents within the scope of Mr. Potter's June 2, 2006 FOIA request, and further requiring DoD and NCESGR to take adequate measures to ensure the preservation of documents that are within the scope of that FOIA request.



B. A declaratory judgment finding that DoD and NCESGR's failure to provide documents responsive to Mr. Potter's June 2, 2006 FOIA request violated the FOIA.

C. A permanent injunction directing DoD and NCESGR to take the following steps:

1. Direct each ESGR ombudsmen in Colorado who has mediated any USERRA-related mediation case from 2004 to the present to provide their files on such mediation cases to NCESGR.

2. Direct each ESGR ombudsmen in Colorado to prepare an index of any mediation case files that were destroyed after June 2, 2006.

3. Make available to Plaintiffs all documents responsive to Mr. Potter's June 2, 2006 FOIA request regardless of whether the documents originated from NCESGR or from individual volunteer ombudsmen.

4. Take steps to reconstruct any case file records on USERRA-related mediation cases in Colorado between 2004 and the present that were destroyed after June 2, 2006.

D. An order directing that the Court will retain jurisdiction of this matter so as to ensure compliance with its injunction.

E. An award of Plaintiffs' reasonable attorney's fees and costs in connection with this civil action.

F. Such other relief as the Court may deem just and necessary.

**VERIFICATION**

STATE OF COLORADO            )  
  )  
CITY & COUNTY OF DENVER    )

Maximilian Potter, of lawful age, being first duly sworn, upon oath under penalty of perjury, under the laws of the United States, deposes and states:

1.       That he is one of the Plaintiffs in the above-entitled cause;
2.       That he has read the above and foregoing Verified Complaint and knows the contents thereof; and
3.       That the facts therein set forth are true and correct to the best of his knowledge and belief.

A handwritten signature in dark ink, appearing to read "Maximilian Potter", is written over a horizontal line.

Maximillian Potter

Respectfully submitted this 14th day of July, 2006.

By: /s Christopher P. Beall

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